

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 98 OF 2005.

The Municipal Corporation of
Greater Mumbai, a statutory
Corporation incorporated under
the provisions of the Mumbai
Municipal Corporation Act, 1888
having its office at Mahapalika
Bhavan, Mahapalika Marg,
Mumbai 400 001.

... Petitioner.

Versus.

Gammon India Limited,
a company incorporated under the
provisions of the Companies Act,
I of 1956, having its office at
Gammon House, Veer Savarkar Marg,
Prabhadevi, P.O.Box No. 9129,
Mumbai 400 025.

... Respondents.

Shri Ramesh Dhanuka with Shri H.C.Pimple i/b Shri
Ujjainwala, Advocate for the Petitioner.

Shri Atul Setalvad, Senior Counsel with Shri Shiraz
Rustomjee i/by Subodh Kurdukar, Advocate the
Respondents.

CORAM : ABHAY S.OKA, J.

**DATE ON WICH ARGUMENTS ARE
CONCLUDED.**

: 7th September, 2007.

**DATE ON WHICH JUDGMENT IS
PRONOUNCED.**

: 22nd October, 2007.

JUDGMENT.:

1. By this petition under section 34 of the
Arbitration and Conciliation Act, 1996 (hereinafter
referred to as "the said Act of 1996") initially an
Award dated 15th September 2004 made by the learned

Arbitrators was challenged. In this petition, an order was passed on 21st March 2006 by which hearing of this petition was adjourned for a period of 12 weeks to enable the Arbitral Tribunal to resume the proceedings and to proceed with the matter in accordance with law. The said order was passed in Arbitration Petition No.1 of 2006 filed by the Respondents. On the basis of the said order learned Arbitral Tribunal resumed the proceedings and supplementary award was made on 14th October 2006. By amending this petition, the Petitioner has been permitted to challenge the said supplementary award.

2. Before advertng to the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief.

3. The Petitioner is the Municipal Corporation of Greater Mumbai. In the year 1998 the Petitioner invited tenders for supply, installation, testing and commissioning of mechanical equipments for Bandra Sewerage Pumping Station. Five bids were received from various bidders including the bid of the Respondents. The Respondents quoted their bid at Rs.16,85,00,000/-. The bid form submitted by the Respondents included some attachments and in paragraph 16.0 of the form, the Respondents demanded reimbursement of actual sales tax

amount paid by them against production of documentary evidence. The Respondents submitted along with the bid form the attachment 10 in which a declaration was given that no sales tax in any form shall be payable by the Petitioner-Corporation for the bought out items. On 15th March 1999 the Petitioner-Corporation called upon the Respondents to clarify the various issues in the bid form. The Respondents clarified the issues and withdrew condition No.16.0. After obtaining approval of the Standing Committee on 10th December 1999, the contract agreement was executed by the Petitioner-Corporation in favour of the Respondents.

4. According to the case of the Petitioner-Corporation, the Respondent started raising demands in respect of sales tax and octroi duty. Therefore, on 26th April 2000 the Petitioner-Corporation called upon the Respondents to submit a formal proposal/procedure which the Respondents would be evolving under the contract in respect of taxes and duties. The Respondents came out with a case that reimbursement of taxes and duties was agreed and discussed in the meeting held on 19th April 2000. The Petitioner-Corporation on 9th May 2000 informed the Respondents that the Petitioner-Corporation would reimburse all the taxes and duties as per the terms and conditions of the contract. On 20th May 2000 the Respondents submitted certain

details to the Petitioner-Corporation as regards the procedure for sales tax reimbursement. The Petitioner-Corporation responded on 1st June 2000 by informing the Respondents that the issue of reimbursement of sales tax was being reviewed by the Petitioner-Corporation and it was pointed out that prima-facie there cannot be reimbursement of sales tax. The Respondents disputed the said decision. The Petitioner clarified that the sales tax in respect of direct transactions between the Petitioner and the Respondents in respect of the plant/equipments and mandatory spareparts would be reimbursed under the terms of the contract.

5. By communication dated 7th August 2001, the Petitioner-Corporation informed the Respondents that the demand raised by the Respondents for reimbursement of the taxes and duties would be examined and till then the claim put up by the Respondents will be kept pending. On 25th October 2001 the Petitioner-Corporation through its Consultants informed the Respondents that no reimbursement of the Central Sales Tax, local taxes and octroi can be made to the Respondents on bought out items. It appears that there were two invoices bearing No.TR-1 and TR-2 dated 8th January 2001 and 10th February 2001. In respect of the said invoices, the Petitioner-Corporation released payment in respect of

the sales tax and octroi duty to the Respondents. The Petitioner-Corporation came to the conclusion that the payments were made under a bonafide mistake and therefore, a decision was taken to recover the said amounts paid by the Petitioner-Corporation to the Respondents from the subsequent bills of the Respondents. The Respondents by their communication dated 1st November 2001 informed the Consultants appointed by the Petitioner-Corporation that the decision of the Petitioner-Corporation was not acceptable and therefore, the Respondents sought to refer the dispute regarding reimbursement of taxes for adjudication as per clause 6.1 of section 4 of the General Conditions of Contract (hereinafter referred to as "GCC"). The Respondents by their letter dated 3rd November 2001 addressed to Shri N.V.Mirani, the Adjudicator named under the said GCC informed that a dispute had arisen between the Petitioner-Corporation and the Respondents regarding reimbursement of sales tax, local tax and octroi. By the said letter, the Respondents gave notice as contemplated by clause 6.1 of the GCC to refer the dispute for adjudication.

6. In the meanwhile the Respondents submitted that the Tax Running bills (T.R.No.3 to T.R.No.9) between 31st March 2001 and 24th August 2001 to the Petitioner-Corporation for settlement of the various

payments. The Petitioner-Corporation by letter dated 12th November 2001 informed the Respondents that the recovery of sales tax and octroi duty already paid to the Respondents to the tune of Rs.47,13,488/- would be made from Invoice No.29 and 30 and the remaining amount would be recovered from the future payments payable to the Respondents.

7. On 8th January 2002, the learned Adjudicator passed an order holding that on the goods purchased from other manufacturers outside Maharashtra by the Respondents and supplied to the Petitioner-Corporation, the Maharashtra Sales Tax levied will be reimbursible to the Respondents if it was a first sale in the State of Maharashtra. It was held that otherwise the re-sale tax, if levied and paid, will be reimbursible. The Adjudicator held that the goods manufactured by others within the State of Maharashtra and procured by the Respondents will not qualify for reimbursement of the sales tax as it was a tax payable on the transaction between the third parties and the Respondents. The Adjudicator held that when the Respondents supplies equipment to the Petitioner-Corporation, only re-sale tax may become payable on such transactions which will qualify for reimbursement. He held that for the goods manufactured by the Contractor himself and supplied to the Employer, the Maharashtra Sales Tax will be

reimbursible under clause 13. The learned Adjudicator held that for the goods manufactured by the Respondents outside Bombay and brought by them or their agents into Bombay for the use the works, the amount of octroi paid will be reimbursible. He further held that for the goods manufactured by others and brought into Bombay for use in the works, the octroi will be reimbursible provided the contractor has actually purchased the equipment outside Bombay and the same was transported and octroi is paid thereon.

8. The Respondents by their letter dated 17th January 2000 called upon the Petitioner-Corporation to pass necessary order for release of the sum of Rs.47,30,498/- being the amount recovered by the Petitioner-Corporation and to release the subsequent bills (T.R.No.3 to T.R.No.9) with interest at the rate of 1% per month.

9. The Respondents by their letter dated 2nd February 2000 informed the Petitioner-Corporation that they were not accepting the decisions conveyed by the Adjudicator, other than those where he had conveyed his decision for reimbursement of certain taxes and duties to the Respondents. By the said letter, the Respondents conveyed their intention to commence arbitration in respect of the remaining matters and disputes under

clause 6.2.1 of the said GCC. The Petitioner-Corporation responded by letter of the same date by informing the Respondents that even the Corporation was not accepting the decision given by the learned Adjudicator and invoked arbitration clause under the GCC. The Petitioner-Corporation by their letter dated 11th March 2007 clarified to the Respondents that the decision of the learned Adjudicator was not acceptable to the Petitioner-Corporation in toto.

10. By letter dated 15th March 2002, the Respondents appointed Shri R.T.Atre, Secretary (Retd.) Maharashtra Public Works Department under clause 6.2.4 of the GCC as their nominee. The Petitioner-Corporation by letter dated 7th May 2002 conveyed its decision of appointing Shri B.C.Joshi, Advocate as its nominee Arbitrator. The aforesaid Arbitrators nominated by the parties appointed Shri N.N.Srikhande as the Presiding Arbitrator.

11. It must be stated here that initial pleadings filed before the Arbitral Tribunal were relating to T.R.No.1 to 9 to the tune of Rs.1,18,70,796/-. The Respondents on 1st July 2002 forwarded T.R.No.10 for reimbursement of the sum of Rs.73,09,025/-. The dispute in respect of the said T.R.No.10 was incorporated by the Respondents in their Statement of Claim before the Arbitral Tribunal.

12. After the written statement was filed by the Petitioner-Corporation, the Respondents submitted two more invoices bearing Nos.TR-11 and TR-12. The said invoices were submitted by the Respondents to the learned Arbitrators. The Petitioner-Corporation by letter dated 14th August 2003 returned Invoice bearing TR No.12 to the Respondents and stated that the amount demanded under the said invoice TR-12 would not form part of the claim before the Arbitral Tribunal.

13. On 15th September 2004 an Award was made directing the Petitioner-Corporation to pay a sum of Rs.2,15,34,020/- inclusive of interest upto 15th September 2004 and further interest on the said amount at the rate of 1% per month on the said amount if not paid on or before 15th November 2004. As stated earlier, a supplementary Award was made on 14th October 2006. By the supplementary Award the Arbitral Tribunal declined to modify the earlier Award dated 15th September 2002.

14. Extensive submissions were made by the learned Counsel appearing for the parties. Brief submissions in writing were also tendered by the learned Counsel appearing for the parties.

15. The first submission of the learned Counsel appearing for the Petitioner-Corporation is that the subject matter of dispute referred to the learned Adjudicator was only relating to recovery of the amount paid by the Petitioner-Corporation under TR-1 and TR-2. Therefore, the Reference to the Arbitral Tribunal was confined only to the dispute as regards TR-1 and TR-2. He submitted that in the statement of claim filed by the Respondents a claim was made only under TR-1 to TR-10. He submitted that TR-3 to TR-10 could not have formed part of the dispute before the Arbitral Tribunal. He submitted that after the time fixed by the Arbitral Tribunal for filing the pleading expired, the Respondents submitted TR-11 and TR-12 without amending their statement of claim. He submitted that an objection was raised that the said invoices could not form part of the claim before the Arbitral Tribunal. He submitted that a specific objection was raised by the Petitioner by returning TR-12 to the Respondents. He submitted that TR-12 was filed by the Respondents as late as on 6th August 2003. He submitted that it is an admitted position that TR-11 and TR-12 were filed by the Respondents during the course of arguments. He submitted that the Arbitral Tribunal had no jurisdiction to Award separate amount on account of taxes payable under of TR-3 to TR-12. It is submitted that the learned Arbitrators had exceeded the jurisdiction by

entertaining and allowing TR-3 to TR-12. He submitted that the Award will have to be set aside in its entirety and this Court has no power to modify the Award while exercising jurisdiction under section 34 of the said Act of 1996.

16. The learned Counsel for the Petitioner-Corporation placed reliance on the Attachment 10 forming part of the contract. He submitted that the said Attachment 10 clearly provides that no sales tax in any form shall be payable by the Corporation for bought out items which were dispatched directly by the Respondents or their assignee under the first contract in case of domestic bidders and second contract in case of foreign bidders. He submitted that the Respondents being domestic bidders, the Petitioner-Corporation was under no obligation to reimburse the amount of sales tax. He submitted that by order dated 21st March 2006 passed by this Court, the Arbitral Tribunal was allowed to resume the proceedings so as to eliminate the ground for setting aside the Arbitral Award. He pointed out that in the arbitral award the submissions based on Attachment 10 were not considered by the learned Arbitrators and therefore, the Arbitrators were allowed to resume the proceedings. He submitted that even after resumption of the proceedings, the Arbitrators did not decide in accordance with Attachment 10.

17. He submitted that the Respondents had withdrawn demand for reimbursement of actual sales tax which was made in paragraph 16 of the bid form. He submitted that in view of the withdrawal of the said demand, the Respondents were not entitled to seek reimbursement. He submitted that the claim allowed by the learned Arbitral Tribunal is contrary to the contract.

18. In the alternative, the learned Counsel for the Petitioner-Corporation submitted that clause 14.2 of the GCC as amended by clause 13 of the Special Conditions of Contract provided that the employer shall bear and pay reimbursement to the Contractor of the sales tax, local tax and octroi in respect of direct transactions between the employer and the contractor imposed on the plant, equipment and machinery as well as mandatory spare parts specified in the price Schedule II. He submitted that from the letter dated 25th October 2000 sent by the Respondent to the Petitioner-Corporation it is clear that even according to the Respondents reimbursement was to be made on the basis of actual payment. He submitted that the Respondents did not prove payments made by them on account of sales tax, octroi duty etc. He submitted that notwithstanding the failure of the Respondents to prove the actual payments, the Arbitral Tribunal derived its own formula by taking the ratio of cost of main

equipment to total cost of items i.e. 0.80 for items of cast iron pipes and fittings, sluice valves etc. and 0.95 for rest of the items on the ground that the accurate assessment was not possible. He submitted that the Arbitral Tribunal has allowed the claim on assumptions and the claim has not been allowed for reimbursement on the basis of actual payment of taxes and duties. He submitted that the Arbitrators have awarded the claim contrary to the terms of the contract which even according to the Respondents contemplated reimbursement of the payment actually made. He submitted that the Arbitral Tribunal has, however, adopted its own formula which is not permissible and the same is in conflict with the public policy.

19. In the alternative, he submitted that the Petitioner-Corporation was liable to reimburse sales tax and octroi duty only on direct transactions between the Petitioner-Corporation and the Respondents. He submitted that the warehouse of the Respondent was located at Bandra, Mumbai. He submitted that the Respondents purchased the material for effecting supplies to the Petitioner-Corporation either from outside the State or within the State of Maharashtra or from the suppliers in Mumbai. It is submitted that the Respondents used to buy material from their suppliers and used to raise invoice upon the Petitioners for the

same after becoming owner thereof as provided in clause 31.2 of the GCC. He submitted that the Petitioner-Corporation could not have become owners of the goods when the same were brought to the warehouse at Bandra and the ownership thereof could have been transferred to the Petitioner-Corporation only thereafter. He submitted that the price quoted by the Respondents in their tender included sales tax, octroi etc. till the stage of bringing the said goods to the warehouse at Bandra. He, therefore, submitted that the Respondents could have recovered levy of duty only on such sale effected by the Respondents in favour of the Petitioner after bringing the goods at warehouse by raising invoice upon the Petitioner-Corporation.

20. The learned Counsel for the Petitioner-Corporation attacked the supplementary award by pointing out that the Arbitral Tribunal has considered the issue of transport cost and octroi under the general law. He submitted that all this could not have been dealt with by the Arbitral Tribunal. In a supplementary Award the Tribunal could have considered only the effect of Attachment 10 and withdrawal of paragraphs 15 and 16 of the bid form. He submitted that though the issue of arbitrability was raised by the Petitioner, the learned Arbitrators have not decided the said issue raised by the Petitioner-Corporation and therefore, the Award is

liable to be set aside.

21. The learned Counsel for the Petitioner-Corporation submitted that there was no ambiguity between the provisions of Attachment 10 and clause 13 of the Special Conditions of Contract read with clause 14 of the GCC. He submitted that Attachment 10 was applicable to the present contract and the Respondents were admittedly not manufacturers and had supplied bought out items. He submitted that clause 13 of the Special Conditions of Contract (for short SCC) could be made applicable only if the Respondents were manufacturers and in that event also the Respondents would have become eligible to claim reimbursement only on the direct transactions between the Petitioner-Corporation and the Respondents.

22. The learned Counsel for the Petitioner-Corporation submitted that paragraph 4.4 of the Bid Form has to be read along with paragraph 5.1 of the Bid Form along with Attachment 10 duly amended and clause 31.2. He submitted that the definition "ex-work" as defined in incoterm and clause 13 of the Special Conditions of Contract ought to have been considered. He submitted that in any event the Respondents could have transferred the equipment under the first contract only after becoming the owners thereof i.e. after making payment

of consideration to their suppliers including payment of all taxes and duties and till stage of bringing the goods at site at Bandra. He, therefore, submitted that the Respondents were not entitled to claim any reimbursement.

23. The learned Counsel for the Petitioner-Corporation submitted that no reasons have been given by the Arbitral Tribunal as to how Attachment 10 was applicable. He submitted that no reasons were given as regards the effect of the insertion and subsequent withdrawal of clause 16. He submitted that the illegality has been committed by the Arbitral Tribunal by placing reliance on the letter of the Commissioner of the Petitioner-Corporation addressed to the Municipal Secretary for securing sanction of the Standing Committee to the contract. He submitted that whatever has been incorporated in the said letter does not form part of the contract and the Arbitral Tribunal has committed an error by proceeding on assumption that whatever was mentioned in the said letter was part of the contract. The learned Counsel, therefore, submitted that the Award as well as the supplementary Award deserves to be set aside.

24. The learned Senior Counsel appearing for the Respondents submitted that in the Arbitration Petition

no specific contention has been raised that the invoice TR 3 to 9 were beyond the scope of reference and therefore, the said contention cannot be considered. He submitted that the only contention raised by the Petitioner-Corporation in the petition is that Invoice TR-10 to 12 were beyond the scope of arbitration. He submitted that the issue referred to the Adjudicator was whether the Petitioner-Corporation was liable to make reimbursement of the sales tax and octroi paid by the Respondents. He submitted that the issue referred to the learned Adjudicator did not relate to any specific invoice. He, therefore, submitted that the issue before the Arbitral Tribunal was as regards the entitlement to the Respondents to reimbursement the octroi and sales tax and issue was not limited to a particular invoice. He submitted that by no stretch of imagination it can be said that for dispute of reimbursement of sales tax and octroi duty forming part of other invoices, a separate Reference had to be made to the adjudicator and thereafter to the Arbitral Tribunal. He pointed out the prayer made by the Respondents in the Statement of Claim filed before the Arbitral Tribunal. He pointed out that a specific amount payable under the invoice TR 1 to 10 was claimed apart from claiming the amounts payable/reimbursible against the sales tax, local tax and octroi under future bills. He pointed out that the prayer in the Statement of Claim was also as regards

further reimbursement payable to the Respondents. He submitted that in any event, before the Arbitral Tribunal, the grievance made by the Petitioner-Corporation was confined to invoice TR-12. He submitted that the Petitioner-Corporation has waived its right to object to other invoices.

25. The learned Senior Counsel for the Respondents further pointed out that there were two contracts between the parties. The first one was supply and the second one was for local transportation, and installation of the equipment and for re-furbishing of the equipment available of the Petitioner-Corporation. It was contended that the prices quoted by the Respondents for supply contract was ex-works price which did not include taxes and duties. He placed reliance on clause 11.4(b) of the instructions to bidders (for short (ITB)) which provided that the plant and equipment including necessary spares manufactured in the country shall be quoted on ex-factory, ex-works, ex-warehouse, or off-the-shelf as applicable basis. He pointed out that sales tax and other levies in respect of direct transaction between the Petitioner and the Respondents were to be quoted separately in Schedule 7. He urged that sales tax and octroi were to be borne by the Petitioners in respect of direct transactions. He submitted that the expression "direction transaction"

means that all transactions between the Respondents and the Petitioner-corporation which do not have any intermediary. He submitted that the transactions which are not direct would be those of procurement of raw materials and intermediary components by the Contractor.

26. The learned Counsel for the Respondents pointed out that in view of Condition No.14.2 of the GCC read with Condition No.13 of SCC, the Petitioner-Corporation will have to pay tax in cases where the Respondents raised invoices on the Petitioner-Corporation which included sales tax payable on the sale by the Respondents to the Petitioner-Corporation. The submission is that in a situation where the Respondents were charged and had paid taxes to their suppliers of the equipments mentioned in Schedule 2, the Petitioner-Corporation was required to reimburse the tax. He pointed out that in Schedule 7 the Respondents quoted the taxes and duties payable on the equipment and spares to be supplied at Rs.1,74,25,000/-. He submitted that Schedule 7 was accepted by the Petitioner-Corporation which admittedly formed a part of the contract.

27. The learned Counsel appearing for the Respondents pointed out that from the note of the Municipal Commissioner prepared for seeking approval to

the contract of the Standing Committee, it is very clear that the Petitioner-Corporation clearly understood the contract as providing for reimbursement of taxes and duties on the bought out equipments supplied by the Respondents. He pointed out that in the detailed break up of cost working, the amount of Rs.1,74,25,000/- quoted in Schedule 7 was specifically shown. he submitted that the very fact that the Petitioners had paid the amount payable under invoices TR-1 and TR-2 clearly shows that the Petitioner-Corporation understood the contract as providing for reimbursement of taxes and duties on bought out equipments supplied by the Respondents.

28. The learned Counsel for the Respondents submitted that the withdrawal of clauses 15 and 16 incorporated in the bid form by the Respondents is of no consequence as liability of the Petitioner-Corporation with respect to payment of sales tax and octroi was already covered by clause 4.2 of the bought out items read with Schedule 7.

29. The learned Counsel for the Respondents submitted that Attachment 10 of the bid form refers to clause 4.4 of the bid form which deals only with the bought out items dispatched under the second contract. He submitted that Attachment 10 will have to be read as

a whole along with the bid form. He submitted that attachment to the bid form do not form part of the contract and on the other hand Schedule 2 and 7 of the bid form have been incorporated in the contract in view of Article 1.1 of the contract. He submitted that in view of Article 1.2 of the contract, in the event of ambiguity or conflict between what is stated in Attachment 10 and Schedule II and VII, the order of precedence will have to be given in the order in which various documents are listed in Article 1.1. He submitted that under Article 1.1 the conditions in SCC and GCC are to be given precedence over the bid and price schedule and Attachment 10 will have to be disregarded in so far as it provides that the sales tax is not payable on bought out items under the first contract.

30. The learned Counsel further submitted that the reference to the ex-factory and ex-work apply to a manufacturer of the equipment. He relied upon the definition of the word "ex-work" in clause 14.4 which provides that the expression exw would mean "ex-factory", "ex-work", "ex-warehouse" or "off-the-shelf" as may be applicable. He submitted that the reference to "off-the-shelf" applies to a situation where a party purchases the equipment as in the case of the Respondents.

31. The learned Counsel for the Respondents further relied upon various decisions relating to the interpretation of the contract. He submitted that the contract should be read as a whole even if one of the clauses thereto is being interpreted. He submitted that the Arbitral Tribunal rightly held that the contract will have to be read contra preferentiam. He submitted that the interpretation of the contract is essentially a matter falling within the purview of the Arbitral Tribunal. He submitted that even if it is established that the interpretation of the contract by the Arbitral Tribunal is erroneous, no interference can be made on that ground under section 34 of the said Act. He submitted that voluminous evidence was adduced by the Respondents to show that the payment of sales tax and octroi claimed from the Petitioner-Corporation was actually made by the Respondents. He relied upon certificate issued by Chartered Accountant. He submitted that while deciding the petition under section 34 of the said Act, the evidence available before the Arbitral Tribunal cannot be reappreciated.

32. The learned Counsel submitted that the Arbitral Tribunal has taken certain ratio on the basis of which the Respondents have been denied reimbursement of the entire amount of sales tax and octroi. He submitted

that the ratio has been applied to the actual amount claimed by the Respondents and the entitlement of the Respondents to the said amount has already been established. He submitted that even assuming that any error has been committed in adopting a formula, as a result of application of formula, the claim of the Respondents has been substantially reduced. He submitted that in any event the application of the ratio taken by the learned Arbitrators is a matter of expert knowledge which cannot be interfered in a petition under section 34 of the said Act. He submitted that the ratio has not been applied only to the sales tax on mandatory spares and not to the octroi. He submitted that the said amount have been awarded on the basis of actuals. He submitted that no interference was called for in a petition under section 34 of the said Act.

33. By way of a rejoinder the learned Counsel for the Petitioner-Corporation submitted that the Arbitral Tribunal has recorded a finding that the Respondents have not established the exact amount paid by them by way of sales tax and octroi. He submitted that the ratio or the formula adopted by the Arbitral Tribunal is not provided for in the contract and an order of reimbursement could have been made only on proof of payment of sales tax and octroi by the Respondents. He submitted that in fact the finding is that the amount of

tax paid by the Respondents have not been established. He submitted that the formula adopted by the Arbitral Tribunal being contrary to the contract, the Award will have to be set aside.

34. I have carefully considered the submissions made by the learned Counsel appearing for the parties. The first grievance made by the learned Counsel appearing for the Petitioner is that the dispute referred to the Adjudicator was only in respect of Invoices Nos.TR-1 and TR-2 and only dispute relating to TR-1 and TR-2 could have been referred to the arbitration. The second grievance is as regards the consideration by the learned Arbitrators of the claim based on TR-3 to TR-10 and TR-11 and TR-12.

35. Clause 6.1 of the General Conditions of Contract provides that if any dispute of any kind whatsoever shall arise between the employer and the contractor in connection with or arising out of the contract, the parties shall seek to resolve such dispute or difference by mutual consultation. If such dispute or difference cannot be resolved by mutual consultation, the dispute shall be referred in writing by either party to the Adjudicator. Under clause 6.1.2 the Adjudicator is required to give a decision in writing within 28 days of a dispute being referred to it. After the decision by

the Adjudicator if the parties are dissatisfied with the decision, the parties may within 56 days of the reference to the Adjudicator give notice to the either party of its intention to commence arbitration.

36. One Shri M.V.Mirani was the Adjudicator. The Respondents referred the dispute to the Adjudicator by their letter dated 3rd November 2001. In the said letter it is stated by the Respondents that a dispute had arisen between them and the Petitioner-Corporation in the matter of reimbursement of the sales tax, local tax and octroi. By communication dated 8th January 2002 the Adjudicator communicated his decision to the parties. In the decision of the Adjudicator, it is stated that the dispute referred to him pertains to reimbursement of sales tax, local tax and octroi by the employer to the contractor. In paragraph 4.6 of the decision, the Adjudicator has stated that during the hearing before the Adjudicator the parties agreed that the decision on the dispute may be conveyed on principles and the quantification of the dues can be worked out as agreed amongst the parties. Both the Petitioner-Corporation and the Respondents were dissatisfied with the decision of the Adjudicator and hence the dispute was referred to arbitration.

37. Before the learned Arbitrators, a statement of

claim was filed by the Respondents. In the statement of claim, the claim for reimbursement was made by the Respondents on the basis of TR-1 to TR-10. The prayer made in the statement of claim reads thus:

"We say that this total amount of Rs.1,91,79,821/- is payable till date against Sales Tax, Local Tax and Octroi. The above claim is upto the date of reference to the Arbitral Tribunal. Sales tax, Local Tax and Octroi payable/reimbursable on invoices raised for the purpose shall be submitted subsequently during course of Arbitration process.

The Arbitral Tribunal may hence kindly award Rs.1,91,79,821/- plus further sums payable/reimbursable against Sales Tax, Local Tax and Octroi."

Thus the claim was made not only in respect of TR-1 to TR-10 but also in respect of sales tax, local tax and octroi payable on invoices raised which were to be submitted subsequently during the course of arbitration process. In the reply filed by the Petitioner-Corporation no objection has been raised to the claim made on the basis of TR-1 to TR-10. In so far as TR-11 is concerned, it must be stated that the same

was filed before the learned Arbitrators and a copy thereof was forwarded to the Petitioner-Corporation. No objection has been raised by the Petitioner-Corporation as regards TR-11. The TR-12 was submitted by the Respondents to the Arbitrators. A copy was also submitted to the Petitioner-Corporation. By letter dated 14th August 2003 addressed to the Respondents, the Petitioner-Corporation raised an objection contending that the amount asked for under TR-12 will not form part of the claim before the Arbitral Tribunal. However, my attention has been invited to the letter dated 27th August 2003 sent by the Deputy Chief Engineer (Mech.& Elect.), Sewerage Project of the Petitioner addressed to the Presiding Arbitrator. In the said letter a request was made to postpone the hearing fixed on 30th August 2003 on the ground that the scrutiny of volumes submitted by the Respondents along with TR-12 cannot be completed before 30th August. Therefore, it appears that the Petitioner-Corporation had no serious objection to TR-12.

38. It must be borne in mind that initially the Petitioner-Corporation made payment by way of reimbursement on the basis of TR-1 and TR-2. In respect of later bills, a stand was taken by the Petitioner-Corporation that the Respondents were not entitled to reimbursement and that reimbursement was

wrongly claimed on the basis of TR-1 and TR-2. Thereafter the Petitioner-Corporation demanded refund of the amount paid to the Respondents under TR-1 and TR-2.

39. The dispute referred to the learned Arbitrators was certainly in respect of entitlement of the Respondents to claim reimbursement of the sales tax, local tax and octroi. In the statement of claim filed by the Respondents, a claim was made in respect of the amounts payable under TR-1 to TR-10 and it was specifically stated that the claim was also being made in respect of invoices subsequently raised which may be submitted during the course of arbitration process. The claim was not only confined to the amounts payable under TR-1 to TR-10 but also in respect of further sums payable against sales tax, local tax and octroi. Though the Petitioner-Corporation disputed the claim for reimbursement, in the reply to the claim, the Petitioner-Corporation did not raise any objection to the claim being made by the Respondents in respect of sales tax, local tax and octroi payable on various invoices raised subsequent to invoice TR-10. As stated earlier, the Petitioner-Corporation failed to raise any specific objection as regards TR-1 to TR-11. Therefore, there is no illegality in the arbitral tribunal considering the monetary claim on the basis of TR-1 to TR-12.

40. The other two issues which are required to be decided are (i) whether the Respondents were entitled to reimbursement of sales tax, local tax and octroi as claimed and if answer to the said question is in the affirmative, (ii) whether the claim for reimbursement granted by the learned Arbitrators is in accordance with the contract.

41. It is not in dispute that the contract is divided into two parts, viz. (i) Supply Item Contract and (ii) Transportation, Erection, Refurishment, Commissioning etc. Contract. For the purpose of the dispute, the first contract is relevant. In so far as the entitlement to reimbursement is concerned, the relevant contract conditions will have to be considered. Article 1.1 of the Contract defines contract documents. Article 1.2 defines order of precedence in the event of any conflict between the contract documents. Articles 1.1 and 1.2 read thus:

1.1 Contract Documents (reference GCC Clause 2)
The following documents shall constitute the Contract between the Employer and the Contractor, and each shall be read and construed as an integral part of the Contract:

- (a) This Contract Agreement and the Appendices hereto.
- (b) Notification of Award.
- (c) Special Conditions of Contract.
- (d) Procedures (as listed).
- (e) Technical Specifications and Drawings.
- (f) General Conditions of Contract.
- (g) The Bid and Price Schedules submitted by the Contractor.

1.2 Order of Precedence (Reference GCC Clause 2)

In the event of any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the order in which the Contract Documents are listed in Article 1.1 (Contract Documents) above.

It will be necessary to refer to the General Conditions of Contract (GCC). Clause 14.2 and 14.4 of the GCC are relevant which read thus:

14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties as well as other local taxes like, e.g. a value added tax (VAT) imposed on the Plant and Equipment

specified in Price Schedule No.1 and that are to be incorporated into the Facilities by the law of the country where the site is located.

14.4 For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Form of Contract Agreement is based on the taxes, duties, levies and charges prevailing at the date twenty-eight (28) days prior to the date of bid submission in the country where the Site is located (hereinafter called "Tax" in this GCC Sub-Clause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, Subcontractors or their employees in connection with performance of the Contract, an equitable adjustment of the Contract Price shall be made to fully take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 (Change in Laws and Regulations) hereof.

The said clauses have been modified by Special Conditions of Contract (SCC). Modification made to clauses 14.2 and 14.4 reads thus:

"GCC 14.2 - In line 2 & 3, delete the words "as well as other local taxes like, e.g. a value added tax (VAT)"
-Add the words "and mandatory spare parts" after the word "Equipment" in line 4.
"The Employer shall also bear and pay/reimburse to the Contractor Sales Tax, Local Tax and Octroi, in respect of direct transaction between the Employer and the Contractor imposed on the Plant and Equipment and mandatory spare parts specified in Price Schedule No.2 to be incorporated into the Facilities, by the Law of the country where the site is located. However, Excise Duty will not be reimbursed separately"

There are certain relevant clauses in the Bid and Price Schedule submitted by the Contractor. Condition No.4.0, 4.2 and 4.4 are relevant for consideration, which read thus:

4.0 We confirm that except as otherwise specifically provided our Bid Prices include

all taxes, duties, levies & charges as may be assessed on us, our Sub-contractor/Sub-Vendor or their employees by all municipal, state or central government authorities in connection with the Facilities, in & outside of India.

4.2 We further understand that notwithstanding 4.0 above, you shall also bear & pay us/our Assignees, Sales Tax (But not the surcharge in lieu of Sales Tax), Local tax and other Levies in respect of direct transaction between you and us/our Assignee, imposed on the Plant & Equipment including Mandatory Spare Parts specified in Schedule No.2 (& also on locally supplied quoted in Schedule No.6, when awarded) to be incorporated in to the Facilities by the Indian Laws.

4.4 We confirm that no Sales Tax in any form shall be payable by you for the brought out items which are dispatched directly by us/our Assignee under the Second Contract as referred to in para 5.0 & 5.1 below) to the project site. However, you will issue requisite Sales Tax declaration forms in respect of such bought out items, on items,

on production of documentary evidence of registration with the concerned Sales Tax Authorities. The minimum value of such items is indicated in Attachment 10.

42. In the bid document submitted by the Respondents clause 16.0 was added, which reads thus:

16.0 You shall reimburse the actual Sales Tax amounts paid by us against production of documentary evidence of our payments of sales tax.

It is an admitted position that the said clause 16.0 was withdrawn by the Respondents. The other relevant material will be Attachment-10 annexed to the bid form. The said attachment is a declaration made by the Respondents in favour of the Petitioner-Corporation. The relevant part of the declaration is as under:

"We confirm that no sales tax in any form shall be payable by you for the bought out items which are dispatched directly by us/our assignee under the first contract in case of domestic bidders and under the second contract in case of foreign bidders (as referred in paragraph 5.0 and 5.1 of the bid form) to the

project site".

It will be necessary to refer to sub-clause (b) of clause 11.4 of the Instructions to Bidders (ITB). The said sub-clause (b) reads thus:

11.4 (b) Plant and equipment including mandatory spares manufactured or fabricated within the Employer's country (Schedule No.2) shall be quoted on an EXW, (ex-factory, ex-works, ex-warehouse or off-the-shelf, as applicable) basis, and shall be inclusive of all costs as well as duties and taxes paid or payable on components and raw material incorporated or to be incorporated in the facilities."

. "Sales tax, local tax and other levies in respect of direct transaction between the Employer and the Contractor shall not be included in the Ex-Works price but shall be quoted separately in Schedule No.7."

43. Before advertng to the aforesaid relevant material for deciding the question of entitlement of the Respondents to reimbursement, it will be necessary to ascertain as to what has been held by the Adjudicator as well the learned Arbitrators. The learned Adjudicator has summarised his decision as under:

5.1 **Sales Tax:**

- (a) For the goods manufactured by the Contractor himself and supplied to the Employer, the Maharashtra Sales Tax will be reimbursable under SCC Clause 13.
- (b) For the goods purchased from other Manufacturers outside Maharashtra by the Contractor and supplied to the Employer, the Maharashtra Sales Tax levied will be reimbursable to the Contractor if it is a first sale in Maharashtra (otherwise, the re-sale tax, if it is levied and paid, will be reimbursable).
- (c) The goods manufactured by others with within Maharashtra and procured by the Contractor will not qualify for reimbursement of the Sales Tax (as it is the tax on the transaction between that party and the Contractor). When the Contractor further supplies the equipment to the Employer, only re-sale tax may become payable on such transactions and hence that would qualify for reimbursement.

5.2 **Octroi.**

- a) For goods manufactured by the Contractor outside Bombay and brought by him or his agent into Bombay for use of these works, amount of Octroi paid is to be reimbursed.
- b) For the goods manufactured by others and brought into Bombay for use in the works, the Octroi will be reimbursable provided the Contractor has actually purchased the equipment outside Bombay and he or his agent transported and paid the Octroi.
- c) If a third party outside Bombay has supplied the goods manufactured by him or others to the Contractor within Bombay, the Octroi paid by the supplier would not be reimbursable.

44. In the impugned Award the learned Arbitrators found that the 1st contract II-a is a simple contract for supply of materials and hence taxation provision as per clause 14 of GCC as modified by clause 13 of SCC will be applicable. The learned Arbitrators came to the conclusion that the Petitioner-Corporation was liable to make reimbursement of taxes and duties only in case of

direct transactions. The other question which is considered and decided by the learned Arbitrators is whether the transactions which are the subject matter of Contract II-a (supply contract) are direct or indirect. After considering various aspects in paragraph 2.2.8 the learned Arbitrators held as under:

"2.2.8 In the light of the above, we hereby decide that since it is essentially a Supply Contract wherein the Claimants as the Contractor are solely responsible for the procurement of all Plant and equipment, supply thereof and later transportation, installation etc. (under the 2nd Contract), the transaction between the Claimants and the Respondents is direct regardless of the multitude of manufacturers/sub-contractors that may be inevitably involved and regardless of the modality in which the actual supplies were to be effected in practice."

In paragraph 2.3.2 the learned Arbitrators have held thus:

"2.3.2 From all the details, it is clear that there are-

- * 2 sets of rate/price figures - One for transaction between the Vendors & the

Claimants, and the other for transaction between the Claimants & the Respondents.

- * 3 sets of figures of taxes/duties
 - paid by Vendors for raw materials and components.
 - paid by Vendors as Excise, CST, MST.
 - payable/paid by the Claimants on the sale prices in Schedule No.2.

Now in a normal case since the transaction between a Contractor and his Vendor is an internal matter between them, it is understood that all taxes and duties such as Excise Duty, CST, MST etc. not only on raw materials and components but also on the finished product are a part of Vendors' costs and reflected in his supply price to the Contractor irrespective of whether these taxes are separately shown or not. Similarly, it is understood that when a Contractor supplied an item to the Employer, his sale price allows for all taxes, duties, etc. payable by the Contractor. In the present case, however,

- i) there is absolutely no ambiguity about the provision that taxes and duties on raw materials and components as also excise

duty on the finished product are the liability of the Claimants and the same are not payable/reimbursable separately by the Respondents,

ii) as stated in the earlier paragraphs we have come to the conclusion that -

- * Contract II-a is a separate Sales Contract.
- * the transaction between the Claimants and the Respondents under the above Contract is a direct transaction only.

These read in conjunction with Respondents' reply to the query raised in the pre-bid meeting (Ref. Annexure 2.1) lead us to the conclusion that all the expenses against taxes and duties incurred by the Claimants (whether by way of direct payments to the authorities after the sale to the Respondents or by way of reimbursement to the Vendors earlier) become payable to them as per the Contract stipulations and the Claimants' quoted prices in Schedule-2 are without taxes and duties paid by the Vendors or by the Claimants. However, for the assessment thereof, various relevant factors have to be looked into before arriving at a fair

decision about the quantum of such taxes and duties."

This is the interpretation put to the relevant clauses in the contract documents by the learned Arbitrators.

45. In this behalf reliance has been placed by the learned Senior Counsel appearing for the Respondents on the decision of the learned Single Judge of this Court in the case of Oil and Natural Gas Corporation Ltd. v/s. Surya Paints and Oil Works (2004 (3) Mah.L.J. page 391. While dealing with the scope of interference by the Court with the arbitral award, the learned Single Judge held that mere erroneous interpretation of the contract by the learned Arbitrator would not justify interference by this Court. It is held that mere erroneous decision cannot be interfered with unless it is pointed out that there is an error apparent on the face of the record or that the learned Arbitrator has travelled beyond the provisions of contract or acted contrary to the public policy or there is something contrary to the law.

46. The main emphasis of the Petitioner-Corporation is on withdrawal of clause 16 in the bid form. The contention is that as clause 16 is withdrawn by the Respondents, now they cannot claim reimbursement of

Sales tax. Even the learned Arbitrators have found that there are contradictions, ambiguity and conflict in the provisions relating to reimbursement of tax incorporated in various contract documents. However, clause 1.2 of the agreement provides that in case of any ambiguity or conflict between the contract documents, the order of precedence shall be the order in which the contract documents are listed in Article 1.1. The first item is the contract agreement and appendices thereto. The second item is notification of award and the third item is the special conditions of contract. Therefore, preference will have to be given to the special conditions of contract. By clause 13 of special conditions of contract clause 14.2 of the GCC has been amended. The effect of the amendment is that the Petitioner-Corporation is under an obligation to bear and pay/reimburse the contractor sales tax, local tax and octroi in respect of direct transactions between the employer and contractor. The reimbursement is in respect of sales tax, local tax and octroi on the plant, equipment and mandatory spare parts specified in price schedule 2 to be incorporated into facilities, by the law and country where the site is situated. Thus there is a clear agreement which provides that the Petitioner-Corporation shall reimburse sales tax, local tax and octroi in respect of direct transactions between the Respondents and the Petitioner-Corporation in

respect of plant, equipments and mandatory spare parts specified in price schedule 2. The GCC is the second last item in Article 1.1 and the bid document and price schedules come last in the order of preference. Hence the Arbitrators have rightly given preference to clauses SCC and GCC.

47. Sub-clause (b) of clause 11.4 of the ITB, it is provided that the plant and equipments including mandatory spare parts manufactured within the employer's country (listed in schedule II) shall be on an ex-factory, ex-works and ex-warehouse (as applicable) basis and shall be inclusive of all costs as well as duties and taxes paid or payable on components and raw materials to be incorporated in the facilities. It is further provided that the sales tax, local tax and other levies in respect of direct transactions between the employer and the contractor shall not be included in the ex-works price, but shall be quoted separately in Schedule 7. Thus on a plain reading of the SCC by which the relevant clauses of GCC stand amended, the entitlement of the Respondents to claim reimbursement on direct transactions is established. In fact in pre-bid conference held on 2nd November 1998 it was clarified by the Petitioner-Corporation that the said Corporation would be liable to payment of taxes and duties only in case of direct transactions.

48. Therefore, the question which arises is what is the nature of the transaction between the Petitioner-Corporation and the Respondents in the sense whether it is direct or indirect. The learned Arbitrators have referred to wide range of items which were the subject matter of supply contract i.e. Contract II-a which includes items like Pumps, Motors, EOT Cranes, Package, Air conditioning units, Ventilation Fans etc. The learned Arbitrators have also referred to Annexure II in Section VI which gives a list of large number of manufacturers of the equipments. After referring to the various terms of the contract documents, the learned Arbitrators were of the view that under the first contract which is a supply contract, the contractors were solely responsible for procurement of all the plants and equipments and were responsible for transportation and installation of the same under the second contract. The conclusion drawn by the learned Arbitrators is that as between the Respondents and the Petitioner-Corporation, the transaction of supply of various items of plant, equipments and mandatory spares was a direct transaction. If the findings recorded by the learned Arbitrators are perused, the aforesaid interpretation put to the terms of the contract appears to be a possible interpretation. The said interpretation put by the learned Arbitrators is after

considering the various documents forming part of the contract documents. The learned Arbitrators have considered the nature of the supply contract. It is very difficult to say that there is any error apparent on the face of the record in so far as these findings are concerned. At the highest it can be said that another interpretation is also possible. Therefore, it is not possible to interfere with the finding regarding entitlement of the Respondents to reimbursement in respect of direct transactions regarding supply of plant, machinery and mandatory spares. It is also difficult to find fault with the conclusion that transaction of supply of various items of plant, machinery, and mandatory spares are direct transactions.

49. So far as reimbursement of taxes is concerned, it will be necessary to refer to the findings recorded by the learned Arbitrators. In clause 2.3.2 the learned Arbitrators have recorded that the taxes and duties on raw materials and components as also excise duty on the finished products is the liability of the Respondents and the Petitioner-Corporation is no under obligation to reimburse the said amount. The learned Arbitrators have held that the taxes and duties incurred by the Claimants (Respondents) are payable to the Respondents as per the contract stipulations. The learned Arbitrators came to the conclusion that the quoted prices in Schedule II of

the bid was without taxes and duties paid by the Respondents. Thus the conclusion drawn by the learned Arbitrators is that the Respondents are entitled to reimbursement from the Petitioner-Corporation in respect of taxes and duties payable on direct transactions in respect of the plant, machinery and mandatory spares.

50. The grievance of the Petitioner-Corporation is that the Arbitrators have not granted reimbursement of actual amount payable by way of sales tax or central sales tax or the octroi duty. But a new formula is devised by the learned Arbitrators for computing the amount of reimbursement. In paragraph 3.4 the learned Arbitrators have held thus:

3.4 From the above schedules it is noted that while Schedule No.2 gives the cost of supply of new items as Rs.1197 lakhs and of Mandatory spare parts as Rs.6 lakhs, Schedule No.7 gives 900 lakhs as the amount of Main Equipment and Rs.6.50 lakhs as the amount of Mandatory Spares on which Taxes/Duties are leviable. Since all the above figures have come at the same time of tendering, it is evident that the Claimants had considered only Rs.900 lakhs as the approximate cost of the Main Equipment out of the total cost of Rs.1197 lakhs for supply items. **Although the**

Claimants have submitted the voluminous details regarding Vendors' costs, taxes incorporated in the Vendor's invoices and the Claimants' invoices for BST/Resale Tax, etc. (Ref.Statements P, Q, R, & S in para 2.3 of Chapter 3), they have not segregated specific details under the heading Main Equipment in Schedule No.7 but have claimed taxes and duties etc. on all the supply items. The Respondents on the other hand have preferred not to refer to this subject matter at all which they would have been normally expected to do in the usual course of Arbitration, notwithstanding their other contentions. (Emphasis supplied).

It must be noted here that the Respondents are held entitled to reimbursement only on supply of plant and machinery as well as mandatory spares. Now what has been found by the Arbitral Tribunal is that the Respondents have not segregated the specific details of the said sales tax and resale tax under the heading main equipment and in fact they have claimed taxes and duties on all supply items. Thus the exact quantification of the price of plant, machinery and mandatory spares has not been placed on record. Thus the finding recorded is that as far as sales tax and resale tax are concerned, the exact figures of the amount which are reimbursable

are not on record and are not specified by the Respondents/Claimants. The claim of the Respondents is of reimbursement on the basis of actual payment as is evidenced from the statement of claim. In the letter dated 25th October 2000 sent by the Respondents to the Petitioner-Corporation, they have stated thus:

"2. Vide Schedule 7 of the pricing sheets you have separately asked for the taxes and duties for all supply items and we have accordingly furnished the same as Rs.1,74,25,000. The rates of sales tax are also specified very clearly by us. However, you will appreciate that the said amount of Rs.1,74,25,000 was calculated at the time of submitting the tender i.e. on 19.1.99. However as per clause 14.2 of the contract you shall reimburse the actual amount of sales tax/local tax, octroi and other taxes paid by us. However, this amount is a provisional one. Actual reimbursement payment has to be made based on actual payment." (Emphasis added)

51. Therefore, it will be necessary to see how the computation of sales tax and local tax on main equipment and mandatory spares is made by the learned Arbitrators.

In Annexure 4.1 and in particular clause 2 thereof, the learned Arbitrators have held thus:

2. Many of the items in the above schedule are composite items comprising part items which are in the category of "Major Equipment" and part one which do not form part of Main Equipment. The proportions of cost of items in the two categories vary from item to item. Thus e.g. while under item of "Motors" (Sr.No.1 in Table-A) the cost of Motors proper is only about 35% to 40% of total cost of the items, for items of C.I.Pipes and Fittings and Sluice Valves etc. (Sr.No.5, 6 & 8 in Table-A) the cost of Main Equipments varies from 75% to 95% of the total cost of the different items. In the rest of the items, the percentages vary from 90% to 100%. Any accurate assessment of individual items is, therefore, not possible. Furthermore -

i) the Claimants quoted rates in Price Schedule No.2 vis-a-vis the Vendors' rates for the respective items (as available from the documents on record) also vary considerably from item to time - they are higher, on par or even lower in different cases and hence no co-relationship can be established

between the Vendors' rates for a particular part item and the Claimants' quoted rate for the composite item.

ii) different parts of the composite items are subject to different taxes.

In the light of the above, we have considered it fair and reasonable to take the ratios of "Cost of Main Equipment" to "Total cost of items" as under -

a) 0.80 for items of CI Pipes and fittings, Sluice Valves, etc.

b) 0.95 for all the rest of the items.

and apply the same ratios for taxes and duties what is stated in (ii) above. Computations for C.I.Pipes and Sluice Valves etc. under (a) above are indicated as a sample to clarify the working in Table "B" enclosed herewith. Table "C" enclosed herewith give the Summary of Sales Tax and Local Tax for the entire Main Equipment and Mandatory Spares computed with the above ratios. (Emphasis added).

Therefore, it is crystal clear that while computing the sales tax and local tax on Main Equipment and mandatory spares, the Arbitral Tribunal has not arrived at a specific conclusion as regards actual taxes payable or paid by the Respondents. The finding of the Arbitral

Tribunal is that the entitlement of the Respondents to "reimbursement" is held proved. However, instead of ordering actual reimbursement on the basis of actual amount of taxes payable on plant, machinery and mandatory spares, a formula has been adopted for computation which is not provided for in the contract.

52. Clause 14 of the GCC as modified by the SCC essentially provides for a reimbursement to the Contractor. In the decision of the Apex Court in the case of Tata Iron and Steel Co.Ltd. v/s. Union of India [(2001) 2 SCC 41], the Apex Court has considered the meaning of the word "reimbursement". In paragraph 16 of the said decision, the Apex Court has held thus:

"16. In common acceptation the word "reimburse" means and implies "to pay back or refund". As a matter of fact it denotes restoration of something paid in excess; as regards the respondent Union of India it cannot but mean to indemnify having regard to the common grammatical meaning of the word "reimbursement". **Reimbursement has to mean and imply restoration of an equivalent for something paid or expended. Reimbursement presupposes previous payment.**" (Emphasis added)

In so far as the computation of sales tax is concerned, the amount granted by the learned Arbitrators is not stated to be the amount which is actually paid by the Respondents or which is actually payable by the Respondents. As per section 28(3) of the said Act of 1996, the Arbitrators are required to decide as per the terms of the contract. The terms of the contract contemplate reimbursement of tax. The contract provides for payment of sales tax by the Petitioner- Corporation to the Respondents provided tax is actually paid by the Respondents. The finding recorded by the learned Arbitrators is that not only that the Respondents have not segregated specific details under the heading "Main Equipment" in Schedule 7, but they have claimed taxes and duties etc. on all supply items. As per the contract even according to the Arbitral Tribunal, the Respondents are not entitled to reimbursement of sales tax and duties on raw materials and components and they are entitled to reimbursement of sales tax only on direct transactions relating to plant, equipments and mandatory spare parts. The Arbitral Tribunal has not recorded a finding that a specific amount of sales tax is payable or is paid on the items relating to which the Respondents have the right of reimbursement. The contract contemplates reimbursement on the basis of actuals and not on the basis of the formula adopted by

the Arbitral Tribunal which is referred to above. In this context it will be necessary to refer to the decision of the Apex Court in the case of Oil and Natural Gas Corporation Ltd. v/s. Saw Pipes Ltd.(Supra). The conclusions of the Apex Court are incorporated in paragraph 74, in which it is laid down that the Court may set aside an Award if the same is against the terms of the contract. In the case of State of Rajasthan v/s. Nav Bharat Construction Co. [(2006) 1 SCC 86], the Apex Court has dealt with the power of the Court under section 30 of the Arbitration Act, 1940 to set aside an Award. The Apex Court held that the Arbitrator cannot make an Award contrary to the terms of the contract. In the present case the Arbitral Tribunal has computed the amount payable to the Respondents towards sales tax not on the basis of actual amount of sales tax but on the basis of the formula which is reproduced in paragraph 2 of Annexure 4.1 to the Award. Therefore, that part of the Award is clearly illegal being contrary to the contract. A submission was sought to be made that what has been awarded by the Arbitrators is less than what is claimed by the Respondents. This submission cannot be accepted as the Arbitral Tribunal has accepted the claim of the Respondents and what has been granted by the Arbitral Tribunal is contrary to the contract.

53. So far as computation of octroi is concerned, the Arbitral Tribunal has found as under:

"4. **COMPUTATION OF OCTROI PAYABLE/REIMBURSABLE:**

. As far as Octroi is concerned, it is noted from the Octroi receipts that the Claimants have made all the payments and have brought various items under Plant and Equipment from the Vendors and delivered the same to the Respondents. No vendor had supplied any plant or equipment directly to the Respondents. Whatever payments the Claimants have made towards Octroi have necessarily to be reimbursed to them by the Respondents, If MCBM, as the Respondents in the present case, had claimed exemption of Octroi payment prior to the Claimants' bringing in the material within the Corporation limit, the question of payment of Octroi would not have arisen. But since this has not happened, reimbursement has necessarily to be done to the Claimants. The total amount claimed by the Claimants is Rs.33,97,399/- and the same is awarded."

Arbitral Tribunal found that no vendor has supplied any plant and equipment directly to the Respondents and therefore, the Respondents are entitled to reimbursement of the octroi. However, there is no specific finding by

the Arbitral Tribunal that the sum of Rs.33,97,399/- is the amount of octroi actually paid by the Respondents on plant, machinery and mandatory spares.

54. Even assuming that the claim of reimbursement of octroi is as per the contract, the question is whether a part of the Award which deals with reimbursement of the octroi can be maintained. In this connection it will be necessary to refer to the decision of the learned Single Judge of this Court dated 11th September 2006 in Arbitration Petition No.135 of 2006 (M/s.Project Engineers v/s. Oil & Natural Gas Corporation Ltd.). The learned Single Judge has held thus:

"The Court under section 34 of the Arbitration and Conciliation Act, 1996 has no power to modify the Award. Power to modify the Award is given by Section 34 of the Act to the Court only when in the Award some claims which do not form part of the submission to arbitration are decided. **In all other case the Court can either set aside the Award or can dismiss the petition and confirm the Award.**"

Another learned Single Judge of this Court by order dated 7th February 2007 in Arbitration Petition No.370 of 2006 has referred the following question to the

Division Bench:

"Whether under the Arbitration and Conciliation Act, 1996, the court is required to set aside the entire award even if it comes to the conclusion that only a part of the Award is bad and the bad part is severable from the good part or whether the court can sever the bad part and modify the award sustaining the good?"

I am informed that the Division Bench has not yet decided the reference. Therefore, the view taken by the learned Single Judge in the case of Project Engineers (supra) stands as of today which binds this Court. Therefore, the entire award will have to be set aside.

55. Hence the petition must succeed and the following order is passed:

O R D E R

- i) Rule is made absolute in terms of prayer clauses (a) and (aa).
- ii) There will be no order as to costs.

Judge.

